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92-1802

No. 92-

IN THE
Supreme Court of the United States
October Term, 1992

VERSYSS INCORPORATED,
Petitioner,
v.
COOPERS & LYBRAND, A PARTNERSHIP;
WILLIAM K. O'BRIEN,
AS MANAGING PARTNER OF COOPERS & LYBRAND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

1. Whether, in a statutory corporate merger, registered securities of a corporation extinguished by the merger should be deemed to be acquired by the surviving corporation, thereby giving root to suits against professionals under Section 11 of the Securities Act of 1933?

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Versyss' predecessor did not acquire NDS stock. Rather, by statutory merger, the predecessor acquired the assets and liabilities of NDS. Accordingly, Versyss has no viable Section 11 claim 5

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RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

A. *Introduction*.

Versyss Incorporated's ("Versyss") Petition for a Writ of Certiorari ("Petition") presents no special or important reason for further review of its claim against Coopers & Lybrand under Section 11 of the Securities Act of 1933. A Section 11 cause of action is available only to those who acquire a security issued pursuant to a registration statement. In this matter, Versyss' corporate predecessor, in whose shoes Versyss stands, did not acquire any securities; rather, it consummated a

merger, thereby acquiring the assets and liabilities, and extinguishing the corporate existence and securities, of the registrant. Thus, the courts below judged correctly that Versyss had no Section 11 claim because there was no acquisition of any registered securities. Because Versyss' Petition lacks merit, no Writ of Certiorari should issue.

B. *Facts.*

Versyss is the putative assignee of and/or successor to Contel Corporation ("Contel") and Contel's wholly owned subsidiary, NDS Merger Corporation ("Contel Subsidiary"). Respondents Coopers & Lybrand and its managing partner William K. O'Brien ("C&L") were alleged to have been contributing experts in a registration statement filed by Northern Data Systems, Inc. ("NDS") in August, 1984, when NDS undertook a public offering. JA-4, 16 to 21.[1]

Versyss' purported Section 11 claim does *not* arise out of NDS' 1984 public offering. Instead, it relates to a statutory merger (the "Merger") the following year. In July, 1985, NDS merged into Contel Subsidiary, pursuant to an agreement and plan of reorganization among Contel, Contel Subsidiary, NDS and NDS' principals, dated May 17, 1985 (the "Merger Contract"). JA-143 to 175, 286. In a third amended complaint, Versyss asserted that, in undertaking the Merger, Contel and Contel Subsidiary relied on NDS' August, 1984 initial public offering registration statement, which it claimed contained misleading financial statements. JA-16 to 21.

The Merger was a statutory merger undertaken "in accordance with the . . . Delaware General Corporation Law and

[1] References to "JA-____" are to the joint appendix filed with Versyss' appeal to the United States Court of Appeals for the First Circuit.

Massachusetts Business Corporation Law."[2] JA-148. The Merger Contract, which governed the Merger, provided for the transfer of NDS assets and liabilities to Contel Subsidiary, and for the extinction of NDS and all of its securities, including the stock registered in 1984. Both Contel Subsidiary's sole stockholder, Contel, and the NDS stockholders voted to approve the Merger, and the Merger was consummated. JA-132, 161, 164.

Pursuant to the Merger Contract, on consummation of the Merger, Contel Subsidiary acquired the assets and liabilities of NDS; NDS' corporate existence terminated; and NDS stock automatically converted to Contel stock, making NDS shareholders Contel shareholders.[3] JA-148, 289 to 290.[4] The Merger Contract contained no mirroring provision that Contel or Contel Subsidiary would become a stockholder of NDS, or that any Contel stock would convert to NDS stock. Instead, after the Merger, the former NDS shareholders, whose shares had converted to Contel stock, exchanged on a formula basis their old NDS certificates for marketable Contel stock certificates through Contel's exchange agent. JA-150.

[2] Massachusetts law applied only with respect to the appraisal rights of any dissenting shareholders. JA-148, 150 to 151, 168.

[3] "The separate corporate existence of NDS shall terminate on the [Merger] Date, and Contel Subsidiary, from and after the [Merger] Date, shall possess all the rights, privileges, immunities and franchises of NDS, and all property, real, personal and mixed, and all debts due on whatever account, and any and all other choses in action, and all and every other interest of or belonging to or due NDS shall be taken and deemed to be transferred to and vested in Contel Subsidiary, without further act or deed, and all debts, liabilities and duties of NDS shall . . . attach to Contel Subsidiary as the surviving corporation of the Merger." JA-148.

[4] "[E]ach outstanding certificate that represented shares of NDS stock prior to the [Merger] Date shall be deemed for all corporate purposes to evidence ownership of the shares of Contel Stock into which such shares of NDS stock have been converted." JA-150.

C. *The Judgments.*

On C&L's motion for summary judgment, the United States District Court for the District of Massachusetts dismissed Versyss' Section 11 claim. Appendix to Petition (hereinafter, "Pet. App.") A23 to A24.[1] *See id.* A26 to A27, reprinting 15 U.S.C. § 77k(a). It ruled that in the Merger neither Contel nor Contel Subsidiary acquired NDS' registered stock, the *sine qua non* of a Section 11 claim. Pet. App. A20. The United States Court of Appeals for the First Circuit affirmed. The First Circuit held that, under the Merger Contract, "the NDS securities ceased to exist at the time of the merger because the corporation ceased to exist." Pet. App. A7 to A8. Contel acquired the assets and liabilities, but not the stock, of NDS. Pet. App. A8. The Court rejected Versyss' argument that Contel acquired NDS stock after executing the Merger Contract, but before the Merger was consummated. "[T]he merger agreement . . . was not a step on the road to Contel's acquiring of NDS securities but rather was an agreement to merge NDS out of existence." Pet. App. A7. Versyss' claim also clashed with Section 11's exclusive damages provision, which requires a plaintiff actually to receive registered securities and then to hold or dispose of them "in the market." Pet. App. A7 to A8. *See id.* A29 to A30, reprinting 15 U.S.C. § 77k(e). "It would be fantasy to speak of the non-existent NDS [stock] as suffering a post-merger decline in value or being resold for less than the purchase price." (footnote omitted) Pet. App. A8.

Summary of Argument

Versyss' petition presents no important question under Section 11. Because Contel/Contel Subsidiary did not acquire any

[1] C&L's opposition will cite to the Appendix to the Petition for reference to the decisions of the courts below as well as the relevant provisions of Section 11, 15 U.S.C. § 77k.

NDS stock in the Merger, Versyss has no Section 11 claim. The First Circuit properly rejected Versyss' claim, which would have required rewriting Section 11 to provide a remedy for those who do not acquire securities in a statutory merger.

Argument

VERSYSS' PREDECESSOR DID NOT ACQUIRE NDS STOCK. RATHER, BY STATUTORY MERGER, THE PREDECESSOR ACQUIRED THE ASSETS AND LIABILITIES OF NDS. ACCORDINGLY, VERSYSS HAS NO VIABLE SECTION 11 CLAIM.

Section 11(a) provides in relevant part:

> In case any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, *any person acquiring such security* . . . may . . . sue. . . .

15 U.S.C. § 77k(a) (emphasis added).[6] "A suit under § 11 . . . may be maintained only by one who comes within a narrow class of persons *i.e.* those who purchase [*i.e.*, acquire] securities that are the direct subject of the . . . registration statement . . ." *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783, 786 (2d Cir. 1951) (Frank, J.). *Accord, Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983).

In the Merger, NDS merged into Contel Subsidiary, predecessor of Versyss. As the surviving corporation, Contel Subsidiary acquired NDS' assets and liabilities; and neither Contel (assignor of Versyss) nor its subsidiary acquired the stock reg-

[6] Section 11(a), 15 U.S.C. § 77k(a), is reprinted at Pet. App. A26 to A27.

istered by NDS the prior year. Pursuant to the Merger Contract, NDS, as well as its stock, ceased to exist. As the First Circuit observed, this is "ordinary merger-law jurisprudence." Pet. App. A5, *citing Frandsen* v. *Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 944 (7th Cir. 1986) ("in a merger the shares of the acquired firm are not bought, they are extinguished"). *See also Shields* v. *Shields*, 498 A.2d 161, 168 (Del. Ch.) ("at the moment a stock for stock merger is effective, the stock in a constituent corporation (other than the surviving corporation) ceases to exist legally"), *appeal refused*, 497 A.2d 791 (Del. 1985); 8 Del. C. § 259(a) (reprinted in appendix hereto).

In applying the federal securities laws, "the starting point in every case . . . is the language itself," *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976), and the courts will accept the language as it is set forth in those statutes. *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943). The plain meaning of "acquire" — "to gain by any means . . . to get as one's own", *Black's Law Dictionary* 24 (6th ed. 1990) — compels the conclusion that no one here acquired NDS stock. The transaction described in the Merger Contract was not a stock for stock swap, a tender offer, or any other acquisition of NDS stock by Contel Subsidiary, the "acquiring" entity. As provided in the Merger Contract, on the date of the Merger, the outstanding shares of NDS stock were automatically converted into Contel stock, making NDS shareholders Contel shareholders. The "exchange" described in the Merger Contract is an exchange of shares held by the NDS shareholders (who have no claim here) for Contel stock. No other exchange of shares took place. Neither Contel nor Contel Subsidiary got, gained, received or otherwise became an owner of NDS stock, whose corporate existence was extinguished by act of merger.

Section 11's damages provision confirms that Contel did not acquire NDS stock. Section 11(e) requires that a plaintiff

(1) acquire a security and (2) either continue to possess it as of the date of suit or dispose of the security "in the market." Pet. App. A29 to A30. As the First Circuit reasoned, it would be "fantasy" to suppose that Contel or Contel Subsidiary could have acquired and then retained and/or disposed of stock "in the market" which had been extinguished in the Merger.[7] Pet. App. A8. Thus, Section 11(e) — as well as the plain language of Section 11(a) — foreclose Versyss' unprecedented assertion that it somehow acquired non-existent stock.

Versyss concedes that the Merger Contract governed the transaction, provided expressly for a statutory merger under Delaware General Corporation Law, and effected the extinction of NDS and NDS stock. Petition 4-5, 12 n.12, 14 n.16. Versyss has no support for its contradictory suggestion that the courts below should have ignored the parties' express agreement. Petition 10-11. The Merger Contract provided for Contel's acquisition of NDS' assets and liabilities but not its stock. Contel or Contel Subsidiary could have acquired NDS stock only if the Merger Contract provided for such an acquisition. The Contract did not.[8]

Contrary to Versyss' assertion, the decisions below do not "undercut[ ] [the 1933 Act's] broad remedial mandate". Petition 11. "[G]eneralized references to the 'remedial purposes' of the securities laws will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980) (citations

[7] Versyss acknowledges that the First Circuit's conclusion on this point follows from a "literal" reading and application of Section 11(e). Petition 8 n.6. It presents no reason for a figurative reading or application of Section 11(e), or 11(a).

[8] Versyss seeks to avoid the consequences of its predecessor's election to acquire NDS via a statutory merger by asserting that the decisions below elevate "form" over "substance" and rely on the "vagaries" of state corporate merger law. Petition 11. The parties, however, freely contracted for the form of the Merger, which reflects its substance, *i.e.*, Contel Subsidiary acquired NDS assets and liabilities, not NDS registered securities. A statutory merger is perfectly straightforward and clear, both in form and substance.

and internal quotation marks omitted). Section 11(a) requires an actual acquisition of registered securities; and Section 11(e) demonstrates in formulating damages that "acquire" means actual acquisition of registered securities. Here, neither Contel nor Contel Subsidiary acquired any such security of NDS.

The case law on which Versyss relies is irrelevant. Applying the "purchase" or "sale" requirement of Section 10(b) of the Securities Exchange Act of 1934, the cases cited recognize standing for: (i) those who actually received stock of the entity surviving a merger;[9] (ii) defrauded sellers who issue securities in a merger;[10] and (iii) "forced sellers" in "freeze out" mergers, in which the seller has no choice but to accept cash or stock of the surviving entity.[11] These cases might have supported a Section 10(b) claim by the former NDS shareholders as purchasers of Contel stock, if Contel had made fraudulent misrepresentations in connection with the Merger. *SEC* v. *National Securities, Inc.*, 393 U.S. 564, 572 (1969) (in Section 10(b) case, Court expressly holds that shareholders of entity extinguished in merger, who received shares in new company, "'purchased' shares in the new company by exchanging them for their old stock"). But they do not even begin to support a claim under Section 11 against C&L that Versyss' predecessor acquired the registered NDS stock. Moreover, the holdings in these Section 10(b) cases, none of which addresses whether a

[9] *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 467 (1969); *Mader* v. *Armel*, 402 F.2d 158, 159 (6th Cir. 1968), *cert. denied sub nom. Young* v. *Mader*, 394 U.S. 930 (1969); *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 591 (5th Cir. 1974); *In re Penn Central Securities Litigation*, 494 F.2d 528, 532, 535-36 (3d Cir. 1974). *Junker* v. *Crory*, 650 F.2d 1349, 1359 (5th Cir. 1981), also cited by Versyss, was a case under § 12(2) of the 1933 Act, in which the plaintiff, a shareholder of the merging corporation, received the shares of the surviving corporation, and thus purchased securities.

[10] *Dasho* v. *Susquehanna Corp.*, 380 F.2d 262 (7th Cir.), *cert. denied, sub nom. Bard* v. *Dasho*, 389 U.S. 977 (1967).

[11] *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 633-34 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967).

plaintiff has acquired securities for Section 11 purposes, are neither unusual nor apposite. As this Court has recognized, Section 10(b) provides standing to a much broader class of persons. *Herman & MacLean* v. *Huddleston*, *supra*, 459 U.S. at 382.

There is no reason to extend Section 11 to provide relief for plaintiffs who do not acquire registered securities. Even if Versyss' predecessor had been harmed as Versyss alleges, common law remedies in state court provide avenues of relief. "'[T]hat a [federal securities] statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.'" *Touche Ross & Co.* v. *Reddington*, 442 U.S. 560, 568 (1979) (citation omitted). Further, this Court has "abandoned" the practice of implying causes of action in federal securities laws, especially where an express cause of action exists. *Holmes* v. *Securities Investor Protection Corp.*, ___ U.S. ___, 112 S.Ct. 1311, 1329 (1992) (Scalia, J., concurring).[12]

[12] Versyss attacks a straw man in arguing that the First Circuit erred in alluding to the parties' sophistication when considering whether to recognize Versyss' Section 11 claim. After concluding that Contel Subsidiary did not acquire NDS stock, the First Circuit observed only that the legislative purpose and history of the 1933 Act does not support stretching Section 11 to encompass Contel Subsidiary's receipt of NDS assets and liabilities. Thus, the First Circuit correctly refused to create an implied cause of action under Section 11. *See Touche Ross & Co.* v. *Reddington*, *supra*, 442 U.S. at 574 ("where [an] express civil remedy for misstatements in reports created by Congress . . . is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action . . . that is significantly broader than the remedy that Congress chose to provide").

Conclusion

For the foregoing reasons, Versyss' Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit in this matter lacks merit and no Writ should issue.

Respectfully submitted,

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Appendix

8 Del. C. § 259

Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation.

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all

liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.